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No. 89-1799 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY M. MASSON,
Petitioner

vs.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC. AND
JANET MALCOLM,
Respondents

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
Counsel of Record
101 California Street
Suite 1600
San Francisco, California 94111
Telephone: (415) 433-1900
Counsel for Respondents
OF COUNSEL: JOSEPH H. COOPER
THE NEW YORKER
25 West 43rd Street
New York, New York 10036

BEST AVAILABLE COPY

CERTIFICATE PURSUANT TO SUPREME COURT RULE 29.1

Pursuant to Supreme Court Rule 29.1, respondents provide the following information on the corporate parties and their parent corporations.

The New Yorker Magazine, Inc., Respondent

Alfred A. Knopf, Inc., Respondent

The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., are owned, through intermediate corporations, by Advance Publications, Inc. All are privately held corporations.

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I. INTRODUCTION

Respondents file the following Supplemental Brief to address the assertions made by two *amici curiae* in support of petitioner Jeffrey Masson and *amici's* criticisms of the lower courts' opinions.

II. *AMICI'S* ARGUMENTS ARE MISPLACED. BY ENSURING THAT QUOTATIONS DO NOT ALTER THE SUBSTANCE OF UNDISPUTED REMARKS, THE TWO LOWER COURTS' OPINIONS PROTECTED AGAINST PUBLICATION OF CALCULATED FALSEHOOD.

Both *amici*, Mountain States Legal Foundation (hereafter "Mountain States") and Center for Individual Rights (hereafter "CIR"), make dire predictions about the consequences of the Ninth Circuit's opinion. With sweeping generalities, but with little or no discussion of the facts of the case, the two *amici* claim that the Ninth Circuit and the District Court have permitted or encouraged knowing falsification of quotations. See, e.g., CIR *amicus* brief at 3-4.

Respondents submit that this is a gross mischaracterization of the Ninth Circuit's ruling. The Ninth Circuit held that actual malice cannot be inferred when quotations do not alter the substantive content of undisputed remarks made by a public figure. (895 F.2d at 1539.) It found that every statement challenged by the petitioner was either derived directly from tapes or substantially true.[1] In light of the Ninth Circuit's standard and its application—

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[1] *All* of the disputed quotations which were not derived directly from the tapes were held to be substantially true. (See 895 F.2d at 1539-43, holding that challenged quotations did not alter the substantive content of undisputed remarks.)

an application that is not seriously challenged by either petitioner or *amici*—it cannot fairly be contended that the lower courts have condoned knowing falsification, or falsification of any kind. The gist of this case is that if there is no substantial falsity, there is no basis for inferring *knowledge* of falsity. The *amici's* assertion that the Ninth Circuit permitted, encouraged, or condoned knowing falsehood is utterly unfounded.

In a significant concession, CIR acknowledges: "Most people speak less carefully than they write. For this reason, journalists occasionally 'alter' an interviewed person's remarks in order to remove hesitations, stammerings or syntactical lapses that would make the speaker appear less than intelligent. Thus the public may not always receive a speaker's unadorned statements." CIR *amicus* brief at 5, fn. 2.

Having thus suggested that the issue of quotations is not black and white, CIR is unable to draw the line anywhere except where the Ninth Circuit drew it. CIR asserts, "When a quotation is altered in substantive content, or entirely fabricated, a writer strips the expression of the speaker's distinctiveness and replaces it with his own." CIR *amicus* at 6. *This is not materially different from the Ninth Circuit's standard:* the Ninth Circuit held that malice *could* be inferred in cases of complete fabrication, or when the quotations "'alter the substantive content'" of the subject's remarks. 895 F.2d at 1539, quoting *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977), *cert. denied sub. nom. Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977).

The Ninth Circuit fully protected the reputational interests at stake here. It found that the challenged quotations (comprising a few words in a text of 48,500 words) did not alter the substance of what Mr. Masson said in recorded interviews, and in three instances were rational interpretations of ambiguous tape-

recorded remarks.[2] The Ninth Circuit *did not* extend First Amendment protections to quotations that have been either wholly made up or so intentionally distorted that they would foreseeably create a false and defamatory impression of the purported speaker.

In place of the majority's standard, CIR proffers the dissent's five-part standard. CIR *amicus* at 16 fn. 7. But an examination of the dissent's standard simply leads back to the majority's. For example, the dissent concedes that changes in quotations "are not actionable" if they are not "material" and "do not go to the *substance* of what the speaker has said and are irrelevant to the *content* of his communication." 895 F.2d at 1564, emphasis added. The dissent's concession that changes which do not go to the "substance" of a conversation and do not affect the "content" are not actionable is really not much different than the majority's standard, which would not infer malice when quotations do not "alter the substantive content." 895 F.2d at 1539.[3]

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[2] It is worthwhile noting that of those quotations found by the Ninth Circuit to be "rational interpretations" of ambiguous remarks, all conversations were on tape. See 895 F.2d at 1544 [discussing quotation "Eissler would have admitted I was right"] and 1545-46 ["aren't too many interpretations possible" and "he had the wrong man"]. Masson's allegation with respect to these latter quotations is that they were "misleadingly edited," not "fabricated." In any event, none of these quotations are even discussed by the *amici*.

[3] The dissent has been criticized for coming "perilously close to adopting . . . a per se rule" of actual malice, and for losing sight of the meaning of actual malice for First Amendment purposes. White & Sheridan, "In Defense of Poetic License," LOS ANGELES LAWYER (April 1990) 28, 52. The only specific example of an "immaterial change" the dissent offers would be deletion of a subject's stammers. 895 F.2d at 1565 fn. 20. Such an expansive definition of "material" changes in a subject's words could prompt a surge of libel litigation from public figures who regret their own words or forget having uttered them, and could impose liability without either substantial falsity or fault.

At issue, then, is not so much what legal standard to apply as a difference of opinion about whether the quotations attributed to Mr. Masson altered the substantive content of his undisputed and unambiguous remarks. This difference is certainly not one which warrants review by this Court. Moreover, in view of the consensus by three of four *judges* who have considered the voluminous record that there were no substantial changes in the content of Mr. Masson's words, it simply cannot be said that the *writer* herself *subjectively* "entertained serious doubts" about the truth. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Reader's Digest Assn.* v. *Superior Court*, 37 Cal.3d 244, 256-57, 208 Cal.Rptr. 137, 690 P.2d 610 (1984), *cert. denied sub. nom Synanon* v. *Reader's Digest*, 478 U.S. 1009 (1986). Without such a showing, by clear and convincing evidence, there is no actual malice.

Respondents have not argued, and do not argue, that there can never be defamation by misquotation. And the Ninth Circuit did not so hold. It did not create an immunity for malicious fictionalizing or willful distortions. The Ninth Circuit simply upheld the findings of a District Court which had looked at petitioner/plaintiff's five different complaints and found in them no creditable assertion of substantive misquotation animated by actual malice.

The Ninth Circuit correctly ruled that there was no basis for the assertion of actual malice because there was no substantial falsehood. If the plaintiff has been thrown out at first base, there is no way he or she can get to second. For purposes only of summary judgment, the Ninth Circuit characterized the alleged departures from undisputed tape-recorded interviews as "fictionalizations" and "fabrications." Still, the Ninth Circuit found that those alleged misquotations were not substantially false—and thus could not be deliberately and calculatedly false, as CIR tries to insist.

Even if petitioner's exact words were edited and consolidated, they were not distorted. Nor were they imagined. In *every* instance, the alleged misquotations are substantially similar to and corroborated by the undisputed tape-recorded interviews.[4] Respondents urge that the Appendix to their Brief in Opposition to the Petition for Writ of Certiorari convincingly demonstrates that the Ninth Circuit was correct in finding that the petitioner in this case was not misrepresented. *A fortiori*, there is no evidence—much less clear and convincing evidence—of actual malice.

CIR next asserts that the Ninth Circuit found evidence of actual malice "irrelevant" (CIR *amicus* at 2) and "assumed" that the challenged quotations were made with actual malice. (CIR *amicus* at 13.) Both sweeping assertions are made without benefit of citation and both are, in fact, entirely incorrect.

The Ninth Circuit addressed a circumstance in which the writer insisted that she had quoted the subject accurately and "invented nothing" (Malcolm Decl., CR 95, ¶ 10, 686 F.Supp. at 1398)[5] and had notes and tapes to back up her assertion. (Ex. B to CR 95, Supplemental Excerpt of Record in Ninth Circuit at 28-31; see also 686 F.Supp. at 1398, fn. 4.) The issue was whether, if Masson's factual contentions were believed, actual malice could be "inferred." The Ninth Circuit never "assumed"

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[4] In a few instances, the quotations are taken almost verbatim from the author's (Malcolm's) notes. Respondents' Appendix at 2-3, 20-21, 28-29.

[5] There is certainly no direct evidence of actual malice. Malcolm's declaration states, "I quoted Mr. Masson accurately, I presented him as he presented himself to me, and in writing my article/book I was consistently and solely guided by the ambition of making him as lifelike and real as possible so that my readers would get the same sense of him that I had received from actually knowing him. I invented nothing . . ." CR 95 at 5, quoted in District Court's opn., 686 F.Supp. at 1398.

that Janet Malcolm had acted with actual malice or "entertained serious doubt" (*St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968)) about the truth of the publication. It simply "assumed," for purposes of summary judgment, that Masson had not said, verbatim, certain words he was quoted as saying. 895 F.2d at 1537. That, of course, does not equate with a finding of actual malice. *Bose Corp.* v. *Consumer's Union*, 466 U.S. 485, 512 (1984); *see also Clyburn* v. *News World Communications*, 903 F.2d 29, 35 (D.C.Cir. 1990) [assuming a jury could discredit reporter's testimony, "such a factual vacuum would not be the same as 'clear and convincing evidence of actual malice'"; summary judgment for publisher affirmed].

CIR cites Sack, LIBEL, SLANDER AND RELATED PROBLEMS (Practicing Law Institute 1980) § II.4.9, but fails to observe that treatise's conclusion that the theory of defamation by quotation

> "must be employed with caution. Quotations are commonplace, the core of many news articles and published opinions. The people quoted commonly complain, rightly or wrongly, that the quotations are inaccurate, and are particularly likely to do so after adverse public reaction to publication of what they said. . . . If courts are not careful to require a showing of substantial, deliberate fabrication or alteration of a plaintiff's remarks and that the fabrication or alteration itself makes genuine injury to reputation a realistic likelihood, lawsuits based on this theory could pose a threat to the ordinary, unobjectionable exercise of reportorial and editorial functions."

Id. at 67-68.

Petitioner has not demonstrated any substantial alteration of his comments (as two courts have now found), nor has he shown any likelihood of injury to reputation as a result of the disputed quotations (as distinguished from the undisputed quotations). His lawsuit, if revived, could pose a substantial threat to the ordinary and unobjectionable practice of quoting from notes and selecting appropriate quotations from a multitude of tape transcripts and notes.

In its *amicus* brief, Mountain States announces that the Ninth Circuit's opinion "in one fell swoop, demolishes nearly two hundred years" of balancing between free speech and reputation. Mountain States *amicus* at 7. Mountain States made an equally sweeping condemnation in supporting petitioner's request for rehearing and rehearing en banc in the Ninth Circuit, warning that without rehearing "the goal sought by our Founding Fathers, a free and open discourse on issues of public concern... will be destroyed." Mountain States' Brief *Amicus Curiae* in Support of Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc, filed September 13, 1989, at 8. Mountain States cites no evidence, however, that in the approximately one year which has passed since this warning, public figures have shied away from speaking to the press, or that the accuracy with which they are quoted has lessened. There is no evidence to support Mountain States' bold prophesy[6].

Behind their rhetoric, both *amici* are tacitly suggesting that the constitutional protection afforded a writer should be deter-

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[6] Interestingly, the two *amici* offer completely opposite views of how public figures present themselves to the press. Mountain States asserts that business leaders and politicians have learned to be "careful and precise" in speaking to the press (Mountain States *amicus* at 5), while CIR comments, "Most people speak less carefully than they write." CIR *amicus* at 5 fn. 2.

mined by punctuation marks and by whether a writer has tapes or notes. Neither *amici* seriously challenges the substantial truth of the quotations attributed to Mr. Masson, and neither mentions that the writer has notes of all untaped quotations. Both *amici* make the unstated assumption that there is some legal or ethical transgression in untaped interviews. This suggestion finds no support in applicable cases, nor should it. *See, e.g., Contemporary Mission, Inc.* v. *New York Times*, 842 F.2d 612, 625-26 (2d Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 145 (1989) [court considers reporter's notes in rejecting allegations of actual malice based upon misquotation at summary judgment stage]; *Fletcher* v. *San Jose Mercury News*, 216 Cal.App.3d 172, 188-190, 264 Cal.Rptr. 699 (1989) [reporter's notes, which were equivocal, considered as court finds no actual malice despite alleged misquotation]. Despite the *amici's* attempts to make this case into something it is not, there is no evidence of actual malice in the face of (1) the writer's insistence that she quoted Mr. Masson accurately and "invented nothing," (2) the notes of a conversation which Mr. Masson admits took place, containing references to matters admittedly discussed, and (3) tapes which substantiate the untaped quotations.

III. NONE OF THE PURPORTED CONFLICTS CLAIMED BY *AMICI* EXIST

Amici claim a number of conflicts. None exist.

CIR asserts a conflict with *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974). CIR *amicus* at 13. *Cantrell*, a "false light" case, is virtually identical to *Carson* v. *Allied News Co.*, 529 F.2d 206 (7th Cir. 1976)—in both cases, the writers described interviews that had not occurred. This Court in *Cantrell* observed that there was "no dispute during the trial" that the reporter, who did not testify, "must have known that a number of

statements in the feature story were untrue." He painted a detailed portrait of a woman whom he had not interviewed. *Cantrell, supra*, 419 U.S. at 253. There is no conflict between this case and *Cantrell*, or between this case and *Carson*.

Mountain States blasts the Ninth Circuit's decision with assertions that it conflicts with virtually every First Amendment decision this Court and others have ever written. Mountain States *amicus* at 7-15. These contentions lack merit.

This Court in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) held (per Justice White) that to satisfy the *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) "reckless disregard" test, "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. This Court stated, in dictum, that "[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based solely on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." Id. at 732.

In this case, of course, the writer has stated that she invented nothing, and that she quoted Mr. Masson accurately. Cr 95, ¶ 10. Even if this testimony is disbelieved, there are 40 hours of tapes, and a 1,056 page transcript of them, so there can be no argument, as there was in *Carson*, that "a story is fabricated by the defendant." Nor can there be any argument that the quotations at issue are "inherently improbable"—indeed, any comparison of the alleged misquotations with the tape transcripts and the notes in Respondents' Appendix shows the quotes are entirely in keeping with petitioner's undisputed tape-recorded statements. If anything is "inherently improbable," it is Mr. Masson's assertion that Janet Malcolm invented her notes, which contain material covering sub-

jects and people Masson admits he discussed with Malcolm on the very day she took the notes. Respondents' Brief in Opposition at 25-26. In short, the Ninth Circuit's decision and that of the lower court were faithful to *St. Amant*.

CONCLUSION

The *amici* have hitched their wagon to the wrong case. Respondents urge careful consideration of what this case *is*, and what it *is not*. This case *is* about 40 hours of interviews given by a public figure who unreservedly sought the limelight for his controversial theories, who volunteered irreverent criticisms of his former colleagues and benefactors, and who offered boastful self-appraisals and intimate details of his personal life. This case *is* one in which the writer has 40 hours of tapes, and notes as well, which show the substantial truth of the quotations. This case is *not* one about a private figure; it is *not* about a fabricated interview; and it is *not* one in which there was a material disparity between the words uttered, and the words quoted. For all those reasons, the *amici's* concerns are unfounded. This case is *not* one that merits this Court's further attention.

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
Counsel of Record

OF COUNSEL: JOSEPH H. COOPER
THE NEW YORKER MAGAZINE, INC.

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